Republican Policy Committee
John Shadegg, Chairman
Established 1949

DISPELLING THE MYTHS: THE USA PATRIOT ACT

UNITING AND STRENGTHENING AMERICA BY PROVIDING APPROPRIATE TOOLS REQUIRED TO INTERCEPT AND OBSTRUCT TERRORISM

In response to the terrorist attacks of September 11, 2001, Congress passed, and the President signed into law, the USA PATRIOT Act. On December 31, 2005, sixteen law enforcement and intelligence provisions of the Act are scheduled to expire. Congress is currently reviewing these temporary provisions, as well as other permanent provisions of the Act. This paper dispels the myths behind several temporary and permanent provisions of the Act.

General Overview

Title II of the USA Patriot Act addresses enhanced foreign intelligence and law enforcement surveillance authority. Sixteen sections of Title II, as well as section 6001 of P.L. 108-458, are set to expire on December 31, 2005.[1] This paper provides a summary of two temporary provisions: section 215 relating to access to business records under the Foreign Intelligence Surveillance Act (FISA), and section 218 relating to foreign intelligence information under FISA, as well as two permanent provisions: section 213 relating to delayed-notice search warrants, and section 505 relating to intelligence subpoena requirements. This paper also summarizes the federal material witness statute.

Section 213 – Delayed-Notice Search Warrant

Myth: Delayed-notice search warrants did not exist prior to the USA PATRIOT Act.

Reality: Delay-notice search warrants have been used by law enforcement and upheld as constitutional for years.

Delayed-notice search warrants are not a creation of the USA PATRIOT Act. Prior to 2001, these warrants were regularly used in criminal investigations ranging from drug trafficking to child pornography.[2] As far back as 1979, the U.S. Supreme Court concluded that delayed-notice search warrants are constitutional[3] and that nothing in the language of the 4th Amendment requires that search warrants include a specification of the precise manner in which they are to be executed.[4] Since then, three federal courts of appeals have reaffirmed the constitutionality of these warrants.[5] Section 213 simply codified the existing authority to conduct delayed-notice searches and seizures and created a uniform standard for issuing these warrants.[6]

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[1] *See* Appendix A.
[2] Testimony of Chuck Rosenberg, Chief of Staff to the Deputy Attorney General, before a House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security Oversight Hearing on May 3, 2005.
[3] *Dalia v. U.S.*, 441 U.S. 238 (1979).
[4] *Id.* at 257.
[5] *See United States v. Freitas*, 800 F.2d 1451 (9th Cir. 1986); *United States v. Villegas*, 899 F.2d 1324 (2d Cir. 1990); *United States v. Simons*, 206 F.3d 392 (4th Cir. 2000).
[6] *See* note 2, supra.

Myth: Section 213 authorizes law enforcement to covertly conduct a search or seize evidence without a finding of probable cause by a judge.

Reality: Delayed-notice does not usurp 4th Amendment protections against unreasonable searches and seizures.

The 4th Amendment requires that a search warrant issue only "upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[7] The Supreme Court has imposed three requirements for a valid search warrant; (1) the warrant must be issued by a neutral, disinterested magistrate, (2) the request for the warrant must demonstrate probable cause to believe that "the evidence sought will aid in a particular apprehension or conviction" for a particular criminal offense, and (3) the warrant must particularly describe the place to be searched as well as the things to be seized.[8]

All search warrants, including delay-noticed search warrants, must meet these requirements to constitute a reasonable search or seizure under the 4th Amendment. Section 213 does not allow for covert searches and seizures in the absence of the approval by a judge based upon a finding of probable cause.

Section 213 authorizes federal law enforcement to delay notification that a search warrant has been executed.[9] Notice may be delayed if the court finds reasonable cause to believe that providing immediate notification of the execution of the warrant may have the adverse result of (1) endangering the life or physical safety of an individual; (2) flight from prosecution; (3) destruction of or tampering with evidence; (4) intimidation of potential witnesses; or (5) otherwise seriously jeopardizing an investigation or unduly delaying a trial.[10]

Law enforcement may not seize any tangible property or any wire or electronic communications (including certain stored wire or electronic communications) through a delayed-notice search warrant unless the court finds reasonable necessity for the seizure.[11] Finally, notice may not be delayed indefinitely – the court sets a specific time within which notice must be given. A delayed-notice warrant must provide for notification within a reasonable period of time and this period may only be extended by the court for good cause.[12]

The government has sought delayed-notice search warrants approximately 155 times under section 213.[13] A report by the Administrative Office of the U.S. Courts (AOUSC) indicates that during the twelve-month period ending September 30, 2003, U.S. District Courts handled 32,539 search warrants.[14] But during the fifteen-month period between April 2003 and July 2004, the Department used section 213 warrants only 60 times.[15]

Section 213 does not sunset.

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[7] U.S. Const. Amend. IV.
[8] *Dalia v. U.S.*, 441 U.S. at 255 (citations omitted).
[9] USA PATRIOT Act, P.L. 107-56, § 213, 18 U.S.C. § 3103a(b).
[10] 18 U.S.C. §§ 3103a(b)(1); 2705(a)(2).
[11] 18 U.S.C. § 3103a(b)(2).
[12] 18 U.S.C. § 3103a(b)(3).
[13] *See* note 2, supra.
[14] *Id.*
[15] *Id.*

Section 215 – Access to Records and Other Items under FISA

Myth: Section 215 allows the federal government to monitor the library and bookstore activities of ordinary, law-abiding citizens.

Reality: Law enforcement may not use section 215 to obtain the records of just anyone. They must first demonstrate to the court that the business records are sought in connection with international terrorism or clandestine intelligence activities.

Criminal grand juries have for years issued subpoenas for business records, including those of bookstores and libraries. Section 215 provides more protection to privacy rights than a grand jury subpoena.[16] A grand jury subpoena does not require approval from a judge. However, a FISA order must be explicitly authorized by a court.[17]

Unfortunately, library use is not limited to law-abiding citizens. Terrorists and spies also use public libraries in the United States and broad. This is not a theory, it is a fact. The 9/11 Commission found that some of the terrorists who attacked America in 2001 used public libraries.[18] In 2004, federal investigators in New York conducted surveillance on an individual associated with Al Qaeda. During the course of their investigation, they discovered that this individual frequently used the computer at a public library despite having a computer at his home.[19] He went to the library to e-mail terrorist associates around the world under the mistaken belief that his activities could not be monitored.[20]

Prior to the USA PATRIOT Act, FISA authorized senior FBI officials to apply for a court order for access to the records of common carriers, public accommodations providers, physical storage facility operators, and vehicle rental agencies, in connection with foreign intelligence investigations.[21] These restrictions were confusing to investigators, who had to determine whether the records fell under one of these categories before seeking a FISA court order.[22] The restrictions also prevented investigators from obtaining records relating to terrorism investigations from sources other than those listed in the statute.

Section 215 now allows Assistant Special Agents in Charge to request FISA court orders and extends the court orders to tangible items including books, records, papers, documents, and other items, from *any* type of entity.[23] The items need not pertain to an identified foreign agent or foreign power as was previously required. Section 215 allows national security investigators to obtain the same types of records that federal prosecutors have long been able to acquire through grand jury subpoenas.[24] These records may only be sought in connection with

[16] Testimony of Ken Wainstein, U.S. Attorney for the District of Columbia, before a House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security Oversight Hearing on April 28, 2005.
[17] *Id.*
[18] *See* Testimony of Robert S. Khuzami, Former Assistant United States Attorney for the Southern District of New York, before a House Judiciary Crime, Terrorism, and National Security Subcommittee Oversight Hearing on April 28, 2005. Ken Wainstein, U.S. Attorney for the District of Columbia, testified in response to a member's question that several of the 9/11 terrorists used libraries in the U.S. to plan the attacks.
[19] *See* note 16, supra.
[20] *Id.*
[21] 50 U.S.C. §§ 1861-1863.
[22] *See* note 16, supra.
[23] USA PATRIOT Act, P.L. 107-56 § 215, 50 U.S.C. §§ 1861-1863.
[24] *See* note 16, supra.

investigations into international terrorism or clandestine intelligence activities. A FISA court order under section 215 may not be used to investigate domestic terrorism or traditional crimes and may not be used to investigate an American solely based upon their political speech.[25]

Critics, referring to section 215 as the "library provision," argue that law enforcement can abuse this provision by tracking book and magazine purchases and Internet activity of law-abiding citizens.[26] Critics also challenge the requirement that recipients of these orders must keep them confidential.[27] This "gag" order, however, is not a creation of section 215. It has been in place for years under FISA.

Section 215 sunsets on December 31, 2005.

Section 218 – Foreign Intelligence Information ("The Wall")

Myth: As enacted in 1978, FISA required a "wall" of separation between law enforcement and intelligence investigations.

Reality: FISA's previous "the purpose" standard did not require a wall of separation between law enforcement and intelligence investigations.

FISA, as passed by Congress in 1978, did not preclude or limit the government's use or proposed use of foreign intelligence information.[28] However, section 218 eliminates any ambiguity regarding "the wall" of separation between law enforcement and intelligence investigations. Today, FISA cannot be used exclusively to gather evidence for a criminal prosecution, including prosecution of a terrorist. However, under the "significant purpose" standard, FISA may be used *primarily* for this purpose, as long as a significant non-law enforcement purpose exists.[29]

FISA governs electronic surveillance and physical searches of foreign powers and their agents inside the United States. An application for a FISA surveillance order must identify or describe the target and must establish that the target is either a "foreign power" or an "agent of a foreign power."[30] An application previously required certification that "*the* purpose for the surveillance order is to obtain foreign intelligence information."[31] The courts and the Department of Justice interpreted this to mean that the "primary purpose" of the surveillance was to obtain foreign intelligence information rather than evidence of a crime.[32] This led to the view that FISA required a "wall" of separation between law enforcement and intelligence investigations and effectively limited the coordination of information sharing between intelligence and law enforcement agencies.

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[25] *See* note 23, supra.
[26] Testimony of Gregory T. Nojeim, Acting Director, ACLU Washington Legislative Office, et al., before a House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security Oversight Hearing on April 28, 2005.
[27] *Id.*
[28] *In re Sealed Case*, 310 F.3d 717, 727 (FISCR 2002).
[29] Testimony of David S. Kris before a House Judiciary Subcommittee on Crime, Terrorism, and National Security Oversight Hearing on April 28, 2005.
[30] 50 U.S.C. §§ 1804(a)(3), 1804(a)(4)(A), 1823(a)(3), 1823(a)(4)(A).
[31] 50 U.S.C. § 1804(a)(7)(B) (emphasis added).
[32] Testimony of Patrick J. Fitzgerald, United States Attorney for the Northern District of Illinois, before a House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security Oversight Hearing on April 28, 2005.

For example, following the 1993 World Trade Center bombing, intelligence personnel had information that conspirators were planning bombings of other prominent sites in New York City, including the United Nations and the FBI building. However, prosecutors were kept in the dark about the details of the bombing plot for fear that prosecutorial involvement – including mere knowledge of the plot – would breach the wall.[33] Section 218 now requires certification that foreign intelligence gathering is a "significant purpose" for a FISA surveillance or physical search order.[34]

Section 218 sunsets on December 31, 2005.

Section 505 – Intelligence Subpoena Requirements

> ***Myth: Section 505 authorizes the FBI to obtain top secret personal information to be used in a criminal prosecution but provides no recourse for challenging such an order in court.***
>
> ***Reality: NSLs, like administrative subpoenas, are merely <u>requests</u> for information.***
> NSLs are requests for information held by a <u>third party</u>, such as a telephone company or Internet service provider. They are not orders to turn over personal documents held by an individual. Section 505 does not authorize the government to search, seize or read a person's mail or the *content* of communications but does authorize the government to obtain the *records* of communications, such as an entry in a phone bill. Moreover, nothing in Section 505 prevents the recipient of a NSL from declining to produce the requested documents, thus requiring the FBI to seek an enforcement order from a federal court.

National Security Letters (NSLs) are requests from the FBI to obtain specific information for use in international terrorism and espionage investigations.[35] NSLs are similar to administrative subpoenas in that they are requests for the production of information and are not self-executing.[36] The FBI's authority to request information through NSLs preceded enactment of the USA PATRIOT Act. In fact, three statutes authorize the use of NSLs: the Electronic Communications Privacy Act, the Right to Financial Privacy Act, and the Fair Credit Reporting Act.[37] These statutes required the FBI to assert that the information sought was related to a foreign power, foreign agent, an international terrorist, or an individual engaged in clandestine intelligence activities.[38]

Unlike grand-jury subpoenas, which need only establish that the requested records are *relevant* to a criminal investigation, NSL requests were subject to a more burdensome standard. Prior to the Act, the FBI had to certify not only that the information sought was relevant to an authorized foreign counterintelligence investigation but that there were "specific and articulable facts" that the person or entity about whom the information was sought was a foreign power or an agent of a foreign power as defined by FISA.[39]

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[33] *Id.*
[34] 50 U.S.C. §§ 1804(a)(7)(B), 1823(a)(7)(B).
[35] Testimony of Matthew Berry, Counselor to the Assistant Attorney General, Office of Legal Policy, before a House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security Oversight Hearing on May 26, 2005.
[36] *Id.*
[37] 18 U.S.C. § 2709(b)(2); 12 U.S.C. § 3414(a)(5); 15 U.S.C. § 1681u.
[38] *Id.*
[39] *See* 18 U.S.C. § 2709 (statutory and historical notes).

The additional requirement of specific and articulable facts often precluded the FBI from using NSLs to gather evidence at the beginning of an investigation. Agents attempting to determine whether an individual was a terrorist or spy could not utilize NSLs to gather information because they were required to provide specific and articulable facts that the individual was a terrorist or spy.[40]

Section 505 revised the standards governing the issuance of NSLs to mirror criminal subpoenas. The FBI may now use NSLs to obtain records so long as they are "relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities provided that such an investigation of a United States person is not conducted solely on the basis of activities protected by the First Amendment of the Constitution of the United States."[41]

The House Judiciary Committee, in its report on the Act, noted that the additional requirement "specific and articulable facts" causes substantial delays in counterintelligence and counterterrorism investigations that are unacceptable as our law enforcement and intelligence community works to thwart additional terrorist attacks that threaten the national security of the United States.[42] The Department of Justice reports that section 505 has proven beneficial to numerous terrorism and espionage investigations and has aided the FBI in discovering links to previously unknown terrorist operatives.[43]

Critics argue that section 505 expands the FBI's power to obtain records in national security investigations with no review by the judiciary.[44] Specifically, critics charge that a recipient has no legal recourse to challenge the validity of the records request in court. This misrepresents the changes implemented by section 505. Section 505 did not remove the ability of a recipient to seek judicial review of NSLs before disclosing the requested information. It simply brought the standard for issuing NSLs in line with grand-jury subpoenas in criminal investigations.

Section 505 does not sunset.

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[40] *See* note 35, supra.

[41] In *Doe v. Ashcroft*, 334 F. Supp. 2d 471 (S.D.N.Y. 2004), a federal district court in New York held 18 U.S.C. § 2709, the statute authorizing use of NSLs to obtain information from wire and electronic communications service providers, to be unconstitutional. The court cited two reasons for its holding: (1) as applied, the statute effectively barred a recipient from challenging an NSL in court; and (2) the statute permanently bars the recipient of a NSL from disclosing its existence. There is an ongoing dispute as to whether the court's decision also struck down section 505 of the Act as unconstitutional. An appeal of the district court's decision is currently pending before the United States Court of Appeals for the Second Circuit.

[42] House Report 107-236 at 61-62 (2001).

[43] *See* note 35, supra.

[44] Testimony of Gregory T. Nojeim, Acting Director, ACLU Washington Legislative Office, et al., before a House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security Oversight Hearing on May 26, 2005.

Material Witness Warrants

Myth: The PATRIOT Act granted federal law enforcement unprecedented authority to arrest and detain material witnesses.

Reality: The PATRIOT Act did not create or expand the use of material witness warrants.

The use of material witness warrants to secure the testimony of a witness before a federal grand jury is a long-standing practice authorized by federal statute that predates the USA PATRIOT Act by many years.[45] Likewise, over thirty states have statutes authorizing courts to issue a warrant, detain, or place into custody a material witness whose appearance cannot be secured by subpoena.[46]

The federal material witness statute allows a judicial officer to issue an arrest warrant if the government establishes probable cause to believe that the witness' testimony is material to a criminal proceeding and that it would be impracticable to secure the witness' presence by subpoena.[47] A material witness may not be detained if the testimony of such witness can adequately be secured by deposition and if further detention is not necessary to prevent a failure of justice.[48] However, release of a material witness may be delayed for a reasonable period of time until the witness' deposition may be taken in accordance with the Federal Rules of Criminal Procedure.[49] The material witness statute does not institute a "gag" order on witnesses. They are free to speak publicly about their arrest and detention as a material witness.

A material witness has the right to legal representation and may challenge his or her arrest and detention in court. A material witness may request a speedy detention hearing at which the witness may be represented by counsel, may present evidence, and may cross-examine government witnesses.[50] The government must prove that "no condition or combination of conditions will reasonably assure the appearance of the person as required."[51]

[45] Testimony of Chuck Rosenberg, Chief of Staff to the Office of the Deputy Attorney General, before a House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security Hearing on Implementation of the USA Patriot Act on May 26, 2005.
[46] In fact, the federal statute mirrors many of the states' statutes regarding material witness warrants. *See, e.g.*, Alaska Stat. § 12.30.050; Kan. Stat. Ann. § 22-2805; Me. Rev. Stat. Ann. tit. 15 § 1104; N.H. Rev. Stat. Ann. § 597:6-d.
[47] 18 U.S.C. § 3144.
[48] *Id.*
[49] *Id.*
[50] 18 U.S.C. § 3142(f).
[51] 18 U.S.C. § 3142(e).